United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 22, 2006

TO : Alvin P. Blyer, Regional Director
Region 29

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Jacobson & Co. 501-2875-6300
Case No. 29-CA-27335 501-2875-7000
501-2875-9200

This case was submitted for Advice as to whether the Employer lost Section 8(c) protection when it predicted that a union election win would result in negative effects on its business. Under the particular circumstances of this case, we conclude that the Employer did not violate Section 8(a)(1).

FACTS

The charge in this case is an outgrowth of a larger dispute set forth in a previous Advice memorandum in Drywall Tapers & Pointers, Local 1974, Case 29-CE-132, et al. (Advice Memorandum dated February 7, 2006). In that case, we directed the Region to hold in abeyance charges alleging that the union violated Sections 8(b)(4)(A), 8(b)(4)(B), and 8(e) when it entered into a consent injunction resolving a work jurisdictional dispute with certain employers.

Briefly, to resolve a long-standing work jurisdictional dispute in the New York City area, on March 17, 2005,[1] a federal district court in New York ordered, with few exceptions, that all construction work by employers who were members to various New York-area multi-employer associations involving "pointing and taping […] shall be the work of [Drywall Tapers & Pointers] Local 1974." Thereafter certain Employers asked for reconsideration and on September 9, the district court ordered an evidentiary hearing to be held to determine which of the employers that were party to the Section 301 lawsuit were bound by this order through their membership in various employer associations.

Subsequently, on November 2, Charging Party Carpenters Local 52 filed a petition in Case 29-RC-11262 to represent a unit of drywall finishers and apprentice drywall finishers employed by Respondent Jacobson & Co. On or about December 13, Jacobson distributed a letter to its unit employees, which stated:

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[1] All dates are in 2005 unless specified otherwise.

> We are asking you to vote **"NO"** against being represented by Local 52.
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> Why? Because a Federal Judge has held that all ordinary drywall finishing work in New York City is to be performed by Tapers Local 1974. The Federal Judge also ordered several large general contractors, including Structure Tone and Turner, to use Local 1974's tapers. This means that if Jacobson wants to continue to do work for these general contractors, it has to use Local 1974 tapers.
>
> What does this mean to Jacobson and you? If Local 52 wins the election, Jacobson (and you) will be unable to do any drywall finishing work for these contractors. We all know what that means.
>
> […]
>
> If Local 52 wins the election, Jacobson will not be able to continue to do work for major general contractors in New York City, including Structure Tone and Turner. If you vote **NO**, Jacobson will still be able to do work with these major contractors. More work for Jacobson means more work for our tapers.

According to Jacobson, all of its work in New York City is as a subcontractor for major general contractors, including Structure Tone and Turner, who were defendants in the federal court suit. Thus, it contends that its letter contains a reasonable prediction of lost work based on objective fact and, thus, is protected by Section 8(c). Five days before the scheduled election, the Union withdrew its petition and filed the instant charge.

On or about December 16, Structure Tone, Turner and the other defendants to the district court suit moved the court to enter a consent injunction in which the employers effectively agreed that Local 1974 would represent its drywall finishers throughout the New York City-area. The Court subsequently entered such an order, which Carpenters Local 52 and a signatory drywall finishing subcontractor have appealed to the Second Circuit. Thereafter Carpenters Local 52 withdraw the representation petition in Case 29-RC-11262.

ACTION

We conclude that the Region should dismiss the instant charge, absent withdrawal, because, under the circumstances of this case, the Employer's statements to employees were privileged by Section 8(c).

An employer is privileged under Section 8(c) to predict the effects that selecting a union may have on employees, provided that the prediction is based on objective fact to convey the employer's belief as to demonstrably probably consequences beyond its control.[2] We conclude here that Jacobson's letter to its employees satisfies this test. Jacobson told its employees that a court "ordered several large general contractors, including Structure Tone and Turner, to use Local 1974's tapers." This statement accurately reflects the district court's March 17 decision, in which the court held that drywall finishing work from Structure Tone, Turner, and other large general contractors "shall be the work of [Drywall Tapers & Pointers] Local 1974." We conclude that the Employer's subsequent prediction that, should Local 52 win the election, Jacobson "will be unable to do any drywall finishing work" for "major general contractors in New York City, including Structure Tone and Turner," accurately conveyed to employees the demonstrably probable consequences of Carpenters representation.[3] And since these consequences stemmed from a court-ordered resolution of an inter-union jurisdictional dispute, the predicted damage to the Employer's business clearly lay beyond the Employer's control.[4] The fact that at the time

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[2] See Center Service System Division, 345 NLRB No. 45, slip op. at 3 (2005), citing NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

[3] In its letter, Jacobson also stated to its employees more broadly that the court ordered that "all ordinary drywall finishing work in New York City is to be performed by Tapers Local 1974." In fact, the court's order runs only to companies that agreed in some way to be bound to the inter-union jurisdictional mechanism. Nonetheless, Jacobson did not predict that it would lose all taping work in New York City should the Carpenters win the election. Rather, Jacobson repeatedly and reasonably predicted that Carpenters representation would cause it to lose work from Turner, Structure Tone and "several large general contractors" who were subject to the court order.

[4] The Board has found employers to have acted in accordance with the Gissel test where they accurately communicated to employees negative comments about unionization voiced by

certain contractors still contested that they were rightly subject to the March 17 order did not deprive Jacobson of statutory protection. The March order remained in place despite the upcoming evidentiary hearing, which ultimately was called off when the contractors entered into a consent agreement just days after Jacobson issued its letter to employees. Accordingly, we conclude that the Employer's communication to its employees was privileged by Section 8(c) and, thus, that the charge here should be dismissed, absent withdrawal.

B.J.K.

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third parties outside the employers' control. See Long-Airdox Co., 277 NLRB 1157, 1158 (1985) (employer within 8(c) when it accurately conveyed to employees comment by customer who told employer that he "would be very apprehensive" of working with employer should it unionize; Board noted employer's statements had factual basis that were corroborated by customer at hearing); Eagle Transport Co., 327 NLRB 1210, 1211 (1999) (employer did not engage in objectionable conduct when it posted four letters from customers prior to union election, which stated reluctance to work with employer should it unionize; Board noted letters "accurately conveyed" customer statements and "did not go beyond the objective facts.")